Supreme Court, U.S.
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No. 02-362

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Ohio Supreme Court in this case disregarded this Court's precedent in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), in order to deny the clearly applicable defense of federal pre-emption. To do so, the Ohio court applied its own rules in an unreasonable way to discriminate against federal law. This case presents a conflict with the decisions of this Court and the Tenth Circuit and warrants review because of the important issue of state evasion of federal pre-emption in rail safety.

1. Respondent strains to avoid these conclusions by misstating the facts and the record and by invoking inapplicable doctrines in an attempt to shield the judgment below from review. Those contentions can be quickly refuted.

First, Respondent devotes much of his opposition to rearguing the facts and claiming that there are alternative bases to support the jury verdict. Opp. 3. Such arguments are wholly irrelevant to this Court's review. The Ohio Court of Appeals held that "the judgment against appellant was based solely on appellee's inadequate signalization claim," Pet. App. 26a, and was therefore pre-empted under *Shanklin*. See Opp. 3 & n.3. The Ohio Supreme Court did not disturb the appellate court's ruling on the basis for the verdict, but rather reversed the pre-emption ruling. Pet. App. 11a, 8a-9a. It is the pre-emption ruling that is before this Court.

Second, Respondent's suggestion that Petitioner "abandoned" his federal pre-emption defense by not presenting additional evidence on federal funding at trial is nonsense. Opp. 5. The trial court acknowledged that "federal funds may have been used" on the crossing, but denied pre-emption based on a legal standard later rejected in *Shanklin*, ruling as a matter of law that there was no pre-emption if the Federal Highway Administration ("FHWA") did not specifically determine the adequacy of the device for that

crossing. Pet. App. 27a.[1] It is absurd to claim that Petitioner had a duty to present further evidence of federal funding at trial when the trial court had ruled that the pre-emption defense was legally precluded even if the devices were federally funded. In fact, far from finding the pre-emption argument abandoned, the Ohio Court of Appeals ruled in Petitioner's favor on pre-emption. *Id.* at 26a.

Third, Respondent misrepresents the statement by counsel at a pretrial hearing that Petitioner could not show that the dollars spent at the Howe Road crossing "'flowed from the federal government other than . . . by implication of everything that's here.'" Opp. 4. This was not an admission of lack of evidence, but an *explanation* of the federal funding system. The FHWA authorizes federal funding on a project basis. See 23 C.F.R. §§ 140.904, 646.216(e)(1). Federal funds are not allocated to a particular crossing. Here, as in every case where there is no federal line item for a particular crossing, Petitioner proved participation of federal funds in the installation of warning devices by showing that the state project was federally funded and that the devices at the crossing were part of that project. Specifically, Kirkland's testimony established federal funding of the Buckeye Crossbuck Program, and it was undisputed that the crossbuck at the Howe Road crossing was a part of that project.[2]

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[1] Contrary to Respondent's claim, Opp. 5 n.4, the trial court did deny the motion to strike Kirkland's affidavit as lacking personal knowledge. Under Ohio law, when a court does not rule on a motion, the motion is deemed denied. *State* v. *Delaney*, 458 N.E.2d 462, 464 (Ohio Ct. App. 1983); Pet. App. 15a n.12.

[2] Moreover, Petitioner performed the installation of the crossbuck pursuant to a contract with the State that provided that reimbursement would be from federal funds. Kirkland Aff. at 2. Respondent falsely suggests that the contract did not apply to this crossing because of a date discrepancy. Opp. 4-5. Susan Kirkland explained in her affidavit that the original contract date of 1993 was extended to 1995 because the State delayed in supplying the crossbuck signs. Kirkland Aff. at 2.

Finally, Respondent claims that the pre-emptive federal warning-device regulation of 23 C.F.R. § 646.214 would not apply because the Buckeye Crossbuck Program would be funded out of federal "experimental research" spending under 23 U.S.C. §§ 403 and 307 (repealed 1998). Opp. 6 & n.5; Pl.-Appellant's Merit Br. at 18-20, *Bonacorsi* v. *Wheeling & Lake Erie Ry.*, 767 N.E.2d 707 (Ohio 2002) (No. 00-2278). That claim is frivolous and was rejected in *Flood* v. *CSX Transportation, Inc.*, No. C-2-99-1186 (S.D. Ohio July 12, 2001). *Flood* held that pre-emption had occurred in the installation of a Buckeye Crossbuck Program sign and that Respondent's argument was flatly inconsistent with the plain language of the regulation and with *Shanklin* because (1) pre-emption occurs whenever 23 C.F.R. § 646.214 is applicable, *Shanklin*, 529 U.S. at 353; (2) this Court held that the regulation by its plain terms applies to "'*any* project where Federal-aid funds participate in the installation of the devices,'" *id.* at 356; (3) the regulations specifically state that their provisions apply regardless of the source of federal funds, Pet. App. 61a-62a; and (4) Respondent's claim that the regulation cannot apply when warning devices are installed "without consideration of specific crossing conditions," Opp. 6 n.5, was directly rejected in *Shanklin*, 529 U.S. at 356. See Pet. App. 61a-63a.[3]

In fact, Respondent's argument about the separate federal funding of an "experimental" program like the Buckeye Crossbuck Program shows that the ruling below was a contrivance. Neither the court below nor the plaintiff could dispute in good faith that this project was federally funded, and that federal funds participated in the installation of the crossbuck at Howe Road. (Indeed, in *Flood* the plaintiff,

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[3] The FHWA has proposed acceptance of the standard crossbuck modifications made in the Buckeye Crossbuck Program. *See* National Standards for Traffic Control Devices: Manual on Uniform Traffic Control Devices for Streets and Highways, 67 Fed. Reg. 35,850, 35,881 (proposed May 21, 2002) (to be codified at 23 C.F.R. pt. 655).

represented by Respondent's counsel, conceded that the Buckeye Crossbuck Program was federally funded based on Kirkland's testimony, see Pet. App. 61a.).[4] There is no doubt that the state official who managed the State's crossing safety programs and oversaw the Buckeye Crossing Program, Pet. App. 14a-15a, had personal knowledge that the Program was federally funded. The court below simply distorted state rules in an effort to defeat the pre-emption of state law in this case.

2. Respondent claims that the decision below presents no federal question, and that the state "personal knowledge" rule is an independent and adequate state ground for decision. Opp. 12-13.[5] But this Court has long ruled that invocation of state evidentiary rules to deny a federal right presents a federal question, for a "federal right cannot be defeated by the forms of local practice." *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 296 (1949); *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943).

Moreover, the "adequate and independent state ground" alleged by Respondent is neither adequate nor independent. The ruling rejecting pre-emption was not based on an independent state law ground; it was an inquiry that turned on the standards of the federal defense. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (where state and federal law are interwoven, the adequate and independent state law doctrine does not apply). In fact, the state court employed an incorrect standard, ignoring the test for pre-emption articulated by this Court in favor of a pre-*Shanklin* test enunciated in the Ohio case *Carpenter* v. *Consolidated Rail Corp.*, 631 N.E.2d 607, 610 (Ohio 1994). See *infra* at 7-10.[6]

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[4] Respondent's statement that Kirkland was not deposed in *Flood* is incorrect, Opp. 10 n.8; she was deposed on January 4, 2001.

[5] Respondent's statement that the petition for certiorari in *Duncan* v. *Kansas City Southern Railway*, 773 So. 2d 670 (La. 2000), *cert. dismissed* 532 U.S. 992 (2001) (No. 00-1396), presented a similar question is false. The petition, filed by the plaintiff, concerned the amount of damages.

[6] Respondent relies on cases that are irrelevant. *See Israel* v. *McMorris*, 455 U.S. 967 (1982) (denial of certiorari in a habeas corpus

A state procedural rule can also never be an "adequate" ground when it is used unreasonably to burden or discriminate against a federal right, as the Ohio court did here. This Court has repeatedly reviewed both the unreasonable application of an otherwise neutral state law rule that burdens a federal right and the discriminatory application of state law to deny a federal right. See Pet. 16-19.

The Ohio Supreme Court's application of its rules to reject Kirkland's testimony of personal knowledge of federal funding was patently unreasonable. Under Ohio law, a statement of personal knowledge is sufficient unless there is contrary evidence. *State ex rel. Corrigan* v. *Seminatore*, 423 N.E.2d 105, 111 (Ohio 1981). There was no contrary evidence in this case. To overcome his failure to provide such evidence, Respondent attempts to contrive a contradiction in Kirkland's own testimony. Kirkland stated in her affidavit that she had personal knowledge of federal funding for the project. Kirkland Aff. at 1. She explained in her deposition that she was involved in the planning process with the FHWA; she set up the funds; and she processed bills for grade crossing projects. Kirkland Dep. at 13, 26, 33. Respondent then asked Kirkland whether she did "personally transfer or receive any funds" for the program, or if those tasks would have been performed by others. Kirkland stated that she did not do the transfers, but would have known about them from others. *Id.* at 14-15. Respondent and the court below distorted this statement to construct a contradiction, alleging that she failed to show personal knowledge of federal funding because she did not personally handle the deposits.

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case involving a refusal to stipulate to the admissibility of polygraph evidence); *Griffin* v. *United States*, 336 U.S. 704 (1949) (remanding a case to a local court to formulate an evidentiary rule because there was no federal rule on the particular question). *Duncan* v. *Tennessee*, 405 U.S. 127 (1972) (per curiam), dismissing certiorari in a double jeopardy case turning on a state rule of pleading, preceded *Michigan* v. *Long*, 463 U.S. 1032 (1983), which explained that where federal and state rights are interwoven, this Court may review the decision below.

Opp. 8 n.7. However, the fact that others actually handled federal deposits does not refute Kirkland's testimony that she had personal knowledge that the Buckeye Crossbuck Program was federally funded. Prior Ohio precedent clearly holds that personal knowledge is established if a person's job duties would place him or her in a position to learn the information from coworkers. Pet. App. 13a-15a.[7] As the manager of the State's federally funded crossing safety programs, under settled Ohio precedent Kirkland would be deemed to know whether the programs she managed were federally funded. Here, Kirkland was directly involved in setting up and managing the Buckeye Crossbuck Program. Pet. 10. With no evidence contradicting Kirkland's testimony of personal knowledge, under Ohio law as previously applied, her personal knowledge was established.[8]

Respondent's attempt to construct an inconsistency in Kirkland's testimony is flawed for a second reason: the alleged contradiction involves the wrong standard of pre-emption. Respondent argues that Kirkland's deposition revealed a lack of personal "knowledge *of the receipt of* federal funding for the project." Opp. 8 n.7 (emphasis added); Pet. App. 6a, 10a. It is federal funds participation, not receipt, that is the standard for pre-emption. Thus even if

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[7] Respondent and the Ohio court state that Kirkland did not work at the Ohio Department of Transportation ("ODOT"), and therefore she could not have knowledge of funds paid to ODOT. Opp. 9; Pet. App. 10a. This is misleading: Kirkland worked at the Ohio Rail Commission ("ORC"), an independent agency "within" ODOT. Ohio Rev. Code § 4981.02(A). Kirkland testified that the ORC administered federal crossing programs but the funds "flow[ed] into" ODOT. Kirkland Dep. at 7.

[8] The cases Respondent cites are distinguishable, either because the affiants did not state they had personal knowledge, *see State ex rel. Bd. of Comm'rs* v. *Tablack*, 714 N.E.2d 917, 920 (Ohio 1999) (per curiam); *State ex rel. Cassels* v. *Dayton City Sch. Dist. Bd. of Educ.*, 631 N.E.2d 150, 155 (Ohio 1994), or because there was a genuine issue of fact. *See Turner* v. *Turner*, 617 N.E.2d 1123, 1126-27 (Ohio 1993) (affiant stated in an affidavit that she had to brake to avoid a collision, while in a deposition, she stated that she might not have had a collision if she did not brake).

Respondent had shown an inconsistency in Kirkland's testimony, it would be immaterial to the issue of pre-emption.

Aside from the fact that it is the participation, rather than receipt, of federal funds that is the predicate for pre-emption, the Ohio court's requirement that federal funding can only be established with documentation of payment receipts or the testimony of an accountant who actually handled the deposit is absurd and is never applied in analogous contexts. In Title IX actions based on discrimination in federally funded educational programs, for instance, a plaintiff need not produce federal funds receipts and an accountant who deposited the funds during the entire period in question to establish that a program was federally funded. Courts have never adopted such evidentiary hurdles, which would severely limit federally created rights. See, *e.g.*, *Horner* v. *Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (Title IX case relying on statutory authority over federal funds to determine federal funding of Board of Education). Moreover, under the Ohio Supreme Court's new rule, the CEO of a defense contractor would be incompetent to testify that his company received federal funds if he did not personally handle the check.

The Ohio Supreme Court thus applied an unreasonable interpretation of a state evidentiary rule to defeat a federal right, and in doing so blatantly departed from Ohio precedent. The only logical inference is that the court below acted out of hostility toward federal pre-emption of state tort law. This Court has never permitted such discriminatory application of state rules to undermine federal law, nor should it do so here.

3. Respondent struggles to deny the conflicts between the Ohio Supreme Court and this Court, as well as the Tenth Circuit. Respondent attempts to show that *Easterwood* and *Shanklin* refute Petitioner's position by mischaracterizing that position as arguing that "a mere commitment to fund" a project suffices to establish federal funds participation and pre-emption. Opp. 16. To the contrary, Petitioner argues that

the proper interpretation of when "Federal-aid funds participate in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i), is that adopted by this Court in *Shanklin*: pre-emption occurs "[w]hen the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds." 529 U.S. at 357. Here, there is no dispute that Kirkland had personal knowledge that the FHWA had approved the Buckeye Crossbuck Program, and there is no dispute that the crossbuck at Howe Road was installed as part of that program and was operating at the time of the accident. To deny Petitioner's pre-emption defense, the Ohio Supreme Court impermissibly disregarded the *Shanklin* "participation" standard and instead invoked its pre-*Shanklin* decision in *Carpenter* to declare the conflicting rule that pre-emption occurs only upon proof of the actual receipt of federal funds. Pet. App. 10a.

Moreover, there is no discordance between the *Shanklin* standard advanced by Petitioner and *Easterwood* (as indeed the Tenth Circuit has ruled, *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 562 (10th Cir. 1995)). In *Easterwood*, this Court stated that when there was no installation of a warning device, there could be no federal funds participation in that installation and therefore no pre-emption. *Easterwood*, 507 U.S. at 673. The authorized grade crossing improvement project at issue in *Easterwood* was "shelved," *id.* at 672, and the federally mandated warning devices were never installed at the crossing in question.[9] By contrast, the crossbuck was installed at Howe Road as part of the Buckeye Crossbuck Program, and thus pre-emption incontrovertibly occurred under *Easterwood* and *Shanklin*.

The Ohio Supreme Court's adoption of a rule that contradicts the plain meaning of the regulation and

[9] Motion sensors had been installed at various locations, but these sensors were not warning devices under the regulations. In addition, the costs of the motion sensors were not allocated to the crossing in question, precluding a finding of "participation" at the crossing. 507 U.S. at 672.

Easterwood and *Shanklin* also places it in square conflict with the Tenth Circuit, which does not equate federal funds participation with actual disbursement. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (holding that that "federal participation began, and [state] law was preempted, no later than January 25, 1983. On that date, the Secretary of Transportation agreed to provide ninety percent of the funds required to install reflectorized crossbucks . . . ."). Respondent remarkably tries to erase the conflict by invoking the rule of *Hatfield*, that the federal government must "expend[] significant federal resources" on the project after FHWA authorization, 64 F.3d at 562. Opp. 18 (noting that *Armijo* requires actual expenditure in line with *Hatfield*). But neither the *Hatfield* nor *Armijo* courts held that "expenditure" occurs only when there is a disbursement of federal funds to the state highway agency. To the contrary, *Hatfield* specifically held that the requisite expenditure of federal resources (*i.e.*, participation of federal funds) occurred when the state agency "conducted an on-site inspection, including preliminary engineering, at a cost of $619.17 in federal funds." 64 F.3d at 561. The performance of work that the FHWA is obligated to fund – the incurrence of "a federally *reimbursable* cost of $619.17," *id.* at 560 (emphasis added) – constituted an "actual expenditure of federal resources . . . specifically directed toward the ultimate installation of the improved warning devices at th[e] crossing." *Id.* at 562. Expenditure in the Tenth Circuit (and in other cases cited by Respondent) does not mean disbursement of funds, which in *Hatfield* did not occur until six years after pre-emption was found to occur. *Id.* at 560, 562; see FHWA, *Financing Federal-Aid Highways* 16 (1999) ("Obligated funds are considered 'used' even though no cash is transferred."). Here, Kirkland testified from uncontroverted personal knowledge that the FHWA approved federal funding for the Buckeye Crossbuck Program, and it was undisputed that federally reimbursable work was performed under this project at Howe Road. Those

uncontroverted facts were sufficient to prove pre-emption under the rule of *Shanklin* and the Tenth Circuit. The Ohio Supreme Court's denial of pre-emption is in square conflict with those decisions.

Respondent cites a number of cases (including *Shanklin*, *Hatfield*, and *Armijo*) where there was evidence of the *receipt* of federal funds. Petitioner does not dispute that such evidence may be probative of federal funds participation in the installation of the warning devices. But those cases do not hold (as the Ohio Supreme Court did) that pre-emption *cannot* be proven if evidence of the receipt of federal funds is absent or unavailable in a particular case. Indeed, one of the cases cited by Respondent expressly disclaimed receipt as a standard for pre-emption because the court could not determine whether the federal funds received went to the crossing in question, given the difficulty of matching receipts and bills of different amounts and time periods. *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999) ("Preemption occurs when all warning devices for which federal payment *is to be made* have been installed and are operating.") (emphasis added).

Petitioner unequivocally proved the participation of federal funds in the installation of devices at Howe Road under the appropriate standard. The court below imposed an undue and discriminatory burden on the assertion of federal rights that is unprecedented under state law, and employed a standard for federal pre-emption that is in contravention of the rule of this Court and other federal courts of appeals. This Court should grant certiorari in this case to review a question of national importance and to uphold the express congressional goal of national uniformity in matters of railroad safety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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